

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR CHANGE OF APPROPRIATION WATER	)	FINAL ORDER
RIGHT G(W)008323-g76L BY VICTOR	)	
STARKEL AND MARILYN M. KOESTER	)	

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the March 4, 1992, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Change of Appropriation Water Right G(W)008323-g76L is hereby granted to Victor Starkel and Marilyn Koester to add a point of diversion by means of a well in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 26, Township 21 North, Range 20 West, in Lake County, and to add an additional place of use containing 70 acres located in the W $\frac{1}{2}$ SW $\frac{1}{4}$  of said Section 26 to Statement of Claim W008323-g76L.

1. This authorization is subject to all prior existing water rights in the source of supply. Further; this

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authorization is subject to any final determination of existing water rights, as provided by Montana law.

2. This authorization is associated with Statement of Claim W008323-g76H. The combined appropriation of the claimed well located in the W $\frac{1}{2}$ SE $\frac{1}{4}$  and the well located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 26, Township 21 North, Range 20 West, Lake County, shall not exceed the historic use of 1200 gallons per minute up to 167 acre-feet of groundwater per year.

3. The Appropriators shall maintain current sprinkler charts and a record of any system changes along with written records of their diversion schedule or power usage so that the flow rate and volume of water diverted can be determined. Said records shall be submitted by November 30 of each year or upon request to the Kalispell Water Resources Regional Office, P.O. Box 860, Kalispell, MT 59903.

4. This authorization is specifically made subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribe in the source of supply. It is the Tribes' position that economic investments made in reliance upon this authorization do not create in the Appropriators any equity or vested right against the tribes. The Appropriators are hereby notified that any financial outlay or work invested in a project pursuant to their authorization is at the Appropriators' risk.

Issuance of this authorization by the Department shall not reduce an Appropriator's liability for damages caused by exercise of this authorization, nor does the Department, in issuing this

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authorization, acknowledge any liability for damages caused by exercise of this authorization, even if such damage is a necessary and unavoidable consequence of the same. The Department does not acknowledge liability for any losses that an Appropriator may experience should they be unable to exercise this authorization due to the future exercise of reserved water rights.

5. Pursuant to Section 85-2-505, MCA, to prevent groundwater contamination, an operational backflow preventer must be installed and maintained by the Appropriators if a chemical or fertilizer distribution system is connected to the irrigation system.

6. This authorization is subject to Section 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

7. The approval of this authorization is not to be construed as recognition by the Department of the water right involved. All claimed rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, and § 85-2-404, MCA.


8. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right

Transfer Certificate, Form 608, pursuant to Section 85-2-424,  
MCA.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 1 day of April, 1992.

  
\_\_\_\_\_  
Gary Fritz, Administrator  
Department of Natural Resources  
and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 1 day of April, 1992 as follows:

Victor Starkel &  
Marilyn M. Koester  
% Bob Starkel  
1030 Baptiste Rd.  
Ronan, MT 59864

Charles N. & Laura Joan Cook  
1329 Old Hwy 93  
Ronan, MT 59864

Swan T. McDonald  
711 Main St. SW  
Ronan, MT 59864

Louise M. Bilile  
1186 Baptiste Rd.  
Ronan, MT 59864

Clayton Matt  
Confederated Salish &  
Kootenai Tribes  
P.O. Box 278  
Pablo, MT 59855

Round Butte Water Co.  
% Bob Smith  
3210 Rolling Rd.  
Ronan, MT 59864

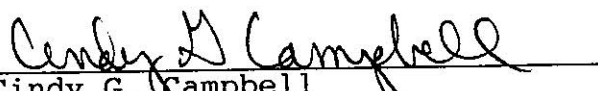
David L. Hanson  
2208 Spring Creek Rd.  
Ronan, MT 59864

Ralph C. Smith  
308 Main St. SW  
Ronan, MT 59864

James L. and Ruth Peel  
1052 Baptiste Rd.  
Ronan, MT 59864

Chuck Brasen, Manager  
Kalispell Water Resources  
Regional Office  
P.O. Box 860  
Kalispell, MT 59903-0860  
(Via Electronic Mail)

Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural  
Resources & Conservation  
1520 E. 6th Ave.  
Helena, MT 59620-2301

  
Cindy G. Campbell  
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION     )  
FOR CHANGE OF APPROPRIATION WATER    )     PROPOSAL FOR DECISION  
RIGHT G(W)008323-g76L BY VICTOR     )  
STARKEL AND MARILYN M. KOESTER     )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on February 18, 1992, in Polson, Montana, to determine whether the above Application should be granted to Victor Starkel and Marilyn Koester under the criteria set forth in § 85-2-402(2), MCA.

APPEARANCES

Applicant Victor Starkel appeared at the hearing in person and by and through his son, Robert Starkel.

Applicant Marilyn M. Koester appeared at the hearing by and through Bob Starkel.

Roger and Ed Starkel appeared at the hearing as witnesses for the Applicants.

Objectors Laura Joan Cook and Charles N. Cook appeared at the hearing by and through Charles N. Cook.

David L. Hanson appeared at the hearing pro se.

Objectors James L. Peel and Ruth Peel appeared at the hearing by and through James L. Peel.

Objector Round Butte Water Company appeared by and through members Wayne Salsbury, John Krantz, Joe Smith, and Ben Johnson.

Mrs. Ben Johnson also appeared at the hearing.

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**JUN 02 1992**

Charles F. Brasen, Manager of the Department of Natural Resources and Conservation's (Department) Kalispell Water Resources Regional Office, appeared at the hearing.

Objector Confederated Salish and Kootenai Tribes did not appear at the hearing but had stated their objections are jurisdictional in nature and they would not attend a hearing in this matter; however, they did want their objection to be made a part of the record.

Objectors Louise M. Bilile and Swan T. McDonald withdrew their objections to this Application on July 8, 1991.

Objector Ralph C. Smith on October 29, 1991, and Objector Round Butte Water Company through its president, Robert J. Smith on October 22, 1991, agreed to the issuance of an Authorization to Change subject to certain conditions to which Applicants had agreed to have placed on an Authorization to Change, if issued.

Objectors Joint Board of Control of the Flathead, Mission, and Jocko Irrigation Districts, and Thomas and Evadeane Walchuk did not appear at the hearing and had not made prior explanations to the Hearings Examiner; therefore, in accordance with ARM 36.12.208, they are in default, their objections are dismissed, and they no longer have status as parties.

#### EXHIBITS

Neither the Applicant nor the Objectors offered exhibits for inclusion into the record.

The Department file was made available for review by all parties who had no objection to any part of it; therefore, it is

entered into the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Section 85-2-402(1), MCA, states, in relevant part, "An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature." The requirement of legislative approval does not apply in this matter.

2. On March 21, 1991, Victor Starkel and Marilyn M. Koester filed an Application for Change of Appropriation Water Right with the Department to add a point of diversion to Statement of Claim W008323-g76L. (Testimony of Robert Starkel and Department file.)

3. Pertinent portions of the Application were published in the Lake County Leader, a newspaper of general circulation in the area of the source, on May 30, 1991. Ten timely objections to the Application were received by the Department. (Department file.)

4. Statement of Claim W008323-g76L claims a well located in the W $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 26, Township 21 North, Range 20 West, in Lake County, as the means of diversion for irrigation of 74 acres



in the E $\frac{1}{2}$ SW $\frac{1}{4}$  and 74 acres in the W $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 26.<sup>1</sup> The claimed flow rate is 1,200 gpm up to 474 acre-feet of groundwater per year. The claimed period of use is from April 15 through October 15, inclusive of each year. The claimed priority date is March 28, 1970. Applicants' Notice of Completion of Groundwater Appropriation by Means of Well developed after January 1, 1962, was filed in the Lake County Courthouse as required by Chapter 237, Montana Session Laws, 1961. (Testimony of Robert Starkel and Department file.)

5. In the course of processing the instant Application, after the Notice of the Application had been published, it was discovered that 70 additional acres of leased ground had been irrigated for the last six years that were not in the claimed place of use. The work copy of the Application was amended to show an additional place of use of 70 acres. The personnel in the Department's Kalispell Regional Office determined that the persons who would object to the additional acreage had already objected to the additional point of diversion and there was no need to publish an amended notice. (Department file and testimony of Charles Brasen.)

6. Applicants seek to add a point of diversion in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 26 and to add an additional place of use containing 70 acres located in the W $\frac{1}{2}$ SW $\frac{1}{4}$  of said Section 26. The

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<sup>1</sup>Unless otherwise specified all land descriptions in this Proposal for Decision are in Township 21 North, Range 20 West, Lake County.

means of diversion would be a flowing well. The water would flow into a sump where it would be pumped through a six-inch conveyance pipe to an existing system of wheel line sprinklers. The wheel lines have 60 feet spacing and are 1,320 feet long. The wheel lines have six gallons per minute heads (gpm) and 33 heads per line. The sprinklers are equipped with devices to shut them off when going over swampy areas or alkali patches. (Testimony of Robert Starkel.)

7. Applicants have seven wheel lines, but only irrigate with five at any given time. Seven lines are in place so that Applicants do not have to move the wheel lines as much. The original well which was drilled in 1970, flowed at a rate of 350 gpm, but was pumped at 1,200 and supplied five wheel lines. The flow of the original well has decreased so that it will supply only three lines. The new well is needed to bring the flow rate up to a minimum of 990 gpm, the amount needed to supply five lines. (Testimony of Robert Starkel and Department file.)

8. The new well was completed March 14, 1989, by Camp Well Drilling and Pump Supply, a water well contractor licensed by the State of Montana. This well has not been used for the proposed irrigation nor was it intended to be an irrigation well. It has been used to supply Robert Starkel's domestic uses. However, it proved to be a very good well that could be used for irrigation. The well is 397.5 feet deep and had a closed-in pressure of eight pounds per square inch and a flow rate of 560 gpm the day it was tested by the well driller. The well was grouted to a depth of

20 feet with a bentonite surface seal. The six-inch casing is perforated from 342 feet to 395 feet. (Testimony of Robert Starkel and Department file.)

9. Applicants had intended to install an electric pump in the sump, but now intend to use a portable pump powered by a tractor until they are sure the well will produce the necessary amount of water before having electricity brought to the pump site. Applicants have no intention of installing a pump on the well. If the well stops flowing, they would use only the sprinklers that could be operated from the old well. (Testimony of Robert Starkel and Department file.)

10. Applicants farm on a rotation program, growing potatoes, alfalfa, and grain. In 1991, Applicants had 40 acres of alfalfa, 60 acres of grain, and 70 acres of potatoes. The current rotation pattern for one piece of ground is potatoes for one year, grain for one year, potatoes one year, grain one year, followed by alfalfa for four years, then start the rotation over. On a dry year, the potatoes are irrigated ten times; the alfalfa is irrigated three times; and the grain is irrigated twice. Using this information, which was given to him by Robert Starkel, Charles Brasen was able to calculate Applicants' historical use of water. Historically, Applicants have used 167 acre-feet of water per year for irrigation. The addition of the new place of use, the 70 acres, will not change the amount of water historically used. Applicants have lost approximately 40 acres of irrigated ground to swamp and alkali, leaving approximately

108 arable acres. The additional 70 acres are needed for the rotation program. Applicants stated several times during the hearing that potatoes are their most important crop and Applicants would, as they have in the past, use the available water for the potatoes, allowing the other crops to dry out. (Department file and testimony of Robert Starkel, Roger Starkel and Charles Brasen.)

11. Applicants own the  $E\frac{1}{2}SW\frac{1}{4}$  and  $W\frac{1}{2}SE\frac{1}{4}$  of Section 26, the claimed place of use. Applicants lease the  $W\frac{1}{2}SW\frac{1}{4}$  of Section 26, the proposed additional place of use. (Department file and testimony of Charles Brasen, Victor Starkel, and Robert Starkel.)

12. Objector Round Butte Water Company is a non-profit corporation made up of approximately 114 farm families who filed a Statement of Claim with the Water Court for multiple domestic use claiming a flow rate of 450 gpm up to 720 acre-feet per year of groundwater from a well. The well was completed at a depth of 355 feet on June 10, 1946 and flowed at a rate of 1,250 gpm. The flow rate has decreased to 85 gpm. Originally the water would flow up to the reservoir then gravity flow to each member. Now the water is pumped at a rate of 200 gpm to other pumps. Round Butte has not hooked up new members since 1975. (Department records and testimony of John Krantz.)

13. Objectors Ruth and James L. Peel and David Hanson are co-owners of a well located in the  $SE\frac{1}{4}SE\frac{1}{4}$  of Section 27. They hold a Certificate of Water Right for a flow rate of 99 gpm up to 30 acre-feet of groundwater per year that is used for domestic,

stock water, and irrigation. This well is 321 feet deep and flowed at a rate of 25 gpm when it was completed on March 2, 1977. On February 8, 1992, this well ceased to flow. Objectors Peel and Hanson have always had a pump on the well. Neither Objectors Peel nor Objector Hanson know the actual flow rate appropriated from the well although both stated they were not using a flow rate of 99 gpm. Another residence has been added to the use of this well in the last year. Objectors Peel and Hanson believe the additional use of their well would not cause as much adverse effect as would have been caused by drilling another well for the additional residence. The new use is metered and the new resident pays Peel and Hanson to "help maintain the well." The Department has not received a Notice of Completion of Groundwater Use from Objectors Hanson and Peel for the additional use. (Department records and testimony of James Peel and David Hanson.)

14. Objectors Cook hold Certificate of Water Right 9801-g76L for a well located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 25 that is used for domestic, stock water, and fish and wildlife. This well was completed at a depth of 311 feet on May 11, 1976. At the time of completion, the well had a closed-in pressure of two pounds per square inch and a flow of 20 gpm through a two and one-half inch pipe. Objectors Cook also hold Permit to Appropriate Water 11271-g76L for a well located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 26. That well was completed at a depth of 299 feet on July 5, 1977. On the date it was tested, this well had a flow

rate of 40 gpm through a two-inch pipe; however Objectors Cook pumped it at a rate of 500 gpm. On April 9, 1987, Objectors Cook filed and the Department subsequently approved an Application for Change of Appropriation Water Right to add a point of diversion, a well located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 25; and two places of use, fish ponds, to Permit 11271-76L. The new well was completed at a depth of 339.5 feet on September 30, 1986. It had a shut-in pressure of 29 pounds per square inch and flowed at a rate of 730 gpm on the day it was tested. On February 18, 1987, Objectors Cook filed and the Department subsequently approved an Application for Beneficial Water Use Permit. The source of water for this Permit is groundwater from the well drilled under Authorization to Change 11271-g76L and the old well under Permit 11271-g76L. (Department records and testimony of Charles Cook.)

Objectors Cook installed a submersible pump at a depth of 40 feet in the new well located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 25. The water table lowered enough to ruin the bearings in the pump. The Cooks will now have to purchase a new pump, probably a turbine pump because a submersible pump is too risky. The new well now flows half the original flow rate. (Testimony of Charles Cook.)

15. All Objectors believe that if Applicants are allowed to irrigate an additional 70 acres, more water would be necessary for Applicants' irrigation, even though Applicants explained their rotational crop use.

16. There are several wells in the area that are allowed to flow without control or beneficial use. (Testimony of Charles

Brasen and Objectors Hanson, Peel, and Cook.)

17. All Objectors who attended the hearing are concerned about future use of the aquifer, specifically mentioning two other wells that have not been permitted.

18. There are no water rights for which a permit has been issued or for which water has been reserved that would be adversely affected by the proposed change. (Department file.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and over the parties hereto. Title 85, chapter 2, part 3, MCA.

2. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner. See Finding of Fact 3.

3. The Department must issue an Authorization to Change Appropriation Water Right if the Applicant proves by substantial credible evidence that the following criteria, set forth in § 85-2-402(2), MCA, are met.

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) Except for a lease authorization pursuant to 85-2-436 that does not require appropriation works, the proposed means of diversion, construction, and operation of the

appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving method will salvage at least the amount of water asserted by the applicant.

4. The proposed use, irrigation, is a beneficial use of water. Mont. Code Ann. § 85-2-102(2) (1989). Applicants would beneficially use all the water diverted and there is no evidence in the record that water would be wasted if the proposed changes are authorized. See Finding of Fact 6 and 10.

5. Applicant has provided substantial credible evidence that the water rights of other appropriators would not be adversely affected. Nor would there be any adverse effect on other planned uses for which a permit has been issued or for which water has been reserved. See Findings of Fact 7, 9, 10, and 18. There may be an effect on other water users; however, it would not be an adverse effect. Although artesian flow is a reasonable means of diversion, it is not a protectable means of diversion. Section 85-2-401(1), MCA, states,

As between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise his water right under the changed conditions.



All the Objectors have used pumps to obtain water from their wells demonstrating they can reasonably obtain water when the artesian pressure has been reduced. See Finding of Fact 12, 13, and 14.

Objectors Cook pumped at a level of 40 feet in their well which was 339.5 feet deep. This proved to be an insufficient depth for a submersible pump. See Finding of Fact 14. A water right does not give an appropriator the right to install a pump which reaches such a shallow depth into the available water supply that a shortage would occur even though diversion by others did not deplete the source below where there would be an adequate supply for the appropriator's lawful demand. See Colorado Springs v. Bender, 148 Colo. 458, 366 P. 2d 552 (1961) at 555; Alamosa-La Jara v. Gould, 674 P 2d 914 (1983); In re Application 31441-g41R by McAllister; In re Application 33484-g40A by Hunt; In re Application 42666-g41F by MacMillan; In re Application 71133-g41B by Hildreth; In re Application 72498-g76L by Cross; In re Application 75997-g76L by Carr.

To hold that an appropriator is entitled to maintain a shallow pumping depth or an artesian flow against subsequent appropriators would allow a single appropriator or a limited number of appropriators to control an entire aquifer simply to make their own means of diversion easier. The principle that no appropriator should be allowed to control the source simply so that he may have a convenient method of diversion, is consistent with the State of Montana's policy of maximizing the beneficial

use of water. Mont. Code Ann. § 85-2-101(3) (1973).

6. There is some question about the volume of water Applicants historically used which will be determined by the Water Court during the Adjudication process. Applicants have, however, provided substantial credible evidence their water use in the past did not exceed 1200 gpm up to 167 acre-feet per year. The filing of a Statement of Claim is prima facie proof of its content; however, evidence at the hearing was sufficient to overcome the volume claimed on Applicants' Statement of Claim. See Finding of Fact 10. While the Department lacks jurisdiction to adjudicate a water right, it must be able to ascertain with reasonable certainty the scope of an existing right in order to determine whether a change can be authorized.

7. Applicants' claimed water right is senior to all Objectors' water rights except Round Butte Water Company. See Findings of Fact 4, 12, 13, and 14. The addition of 70 acres does not change Applicants' claimed priority date. As long as Applicants do not exceed their historical use of water for irrigation, Round Butte Water Company is the only objector with the right to "call" Applicants for water in the event Round Butte Water Company is unable to obtain its water by pumping from the source.

8. The Applicants provided substantial credible evidence the proposed means of diversion, construction, and operation of the appropriation works would be adequate. See Findings of Fact 6, 7, 8, 9, and 10. Applicants' method of operation would not

change with the addition of the 70 acres. Applicants have successfully used the water on the 70 acres for six years. See Finding of Fact 5. Although using a water right on acreage not included in the original water right without an Authorization to Change from the Department is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of an Authorization to Change. Mont. Code Ann. §§ 85-2-122 and 46-18-212 (1989). The Department has no statutory authority to deny a Change Authorization on such grounds. See In re Application No. 52031-s76H by Frost. Moreover, whether the appropriation works were first operated "illegally" is not relevant to how data from that operation serves to satisfy the criteria for issuance of an Authorization to Change. See In re Application No. 61978-s76LJ by Town. There is nothing in the statutes to forbid a change that increases the acreage irrigated as long as the flow rate and volume of water are not increased and there is no increased burden on the source of supply. See In re Application 34573-76H by Grether and In re Application G(W)028708-41I by Hedrich, Straugh, and Ringer.

9. Applicants have possessory interest in the property where the water is to be put to beneficial use. See Finding of Fact 11.

10. Objectors are concerned with the future of the aquifer and the effect of wells flowing without control. See Findings of Fact 16 and 17. Applicants have no burden to disprove potential adverse effects which may be caused by possible future

appropriations of groundwater in the area, or to disprove adverse effects that may be caused by uncontrolled flowing wells owned by other persons. See In re Application 70584-g41B by Petersen Livestock.

11. This Application does not involve salvaged water; therefore § 85-2-402(2)(e) does not apply.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Change of Appropriation Water Right G(W)008323-g76L is hereby granted to Victor Starkel and Marilyn Koester to add a point of diversion by means of a well in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 26, Township 21 North, Range 20 West, in Lake County, and to add an additional place of use containing 70 acres located in the W $\frac{1}{2}$ SW $\frac{1}{4}$  of said Section 26 to Statement of Claim W008323-g76L.

1. This authorization is subject to all prior existing water rights in the source of supply. Further; this authorization is subject to any final determination of existing water rights, as provided by Montana law.

2. This authorization is associated with Statement of Claim W008323-g76H. The combined appropriation of the claimed well located in the W $\frac{1}{2}$ SE $\frac{1}{4}$  and the well located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 26, Township 21 North, Range 20 West, Lake County, shall not exceed the historic use of 1200 gallons per minute up to 167

acre-feet of groundwater per year.

3. The Appropriators shall maintain current sprinkler charts and a record of any system changes along with written records of their diversion schedule or power usage so that the flow rate and volume of water diverted can be determined. Said records shall be submitted by November 30 of each year or upon request to the Kalispell Water Resources Regional Office, P.O. Box 860, Kalispell, MT 59903.

4. This authorization is specifically made subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribe in the source of supply. It is the Tribes' position that economic investments made in reliance upon this authorization do not create in the Appropriators any equity or vested right against the tribes. The Appropriators are hereby notified that any financial outlay or work invested in a project pursuant to their authorization is at the Appropriators' risk.

Issuance of this authorization by the Department shall not reduce an Appropriator's liability for damages caused by exercise of this authorization, nor does the Department, in issuing this authorization, acknowledge any liability for damages caused by exercise of this authorization, even if such damage is a necessary and unavoidable consequence of the same. The Department does not acknowledge liability for any losses that an Appropriator may experience should they be unable to exercise this authorization due to the future exercise of reserved water rights.

5. Pursuant to Section 85-2-505, MCA, to prevent groundwater contamination, an operational backflow preventer must be installed and maintained by the Appropriators if a chemical or fertilizer distribution system is connected to the irrigation system.

6. This authorization is subject to Section 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

7. The approval of this authorization is not to be construed as recognition by the Department of the water right involved. All claimed rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, and § 85-2-404, MCA.

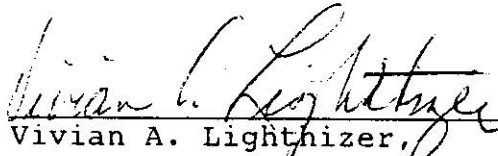
8. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

#### NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must

be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered. The defaulted objectors are restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by the defaulted objectors on other substantive issues. No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 4<sup>th</sup> day of March, 1992.

  
Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 4<sup>th</sup> day of March, 1992 as follows:

Victor Starkel &  
Marilyn M. Koester  
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